STATE OF MICHIGAN

COURT OF APPEALS

SHAIN PARK ASSOCIATES, L.L.C.,

Plaintiff-Appellant,

v

OLIVER HATCHER CONSTRUCTION & DEVELOPMENT, INC.,

Defendant/Third-Party Plaintiff-Appellee,

and

CONQUEST CONSTRUCTION, INC.,

Third-Party Defendant,

and

ROBOVITSKY, INC.,

Third-Party Defendant-Appellee.

UNPUBLISHED
May 5, 2011

No. 294782
2008-096617-CK
LC No. Oakland Circuit Court

Before: WHITBECK, P.J., and O'CONNELL and WILDER, JJ.

PER CURIAM.

Plaintiff Shain Park Associates, L.L.C., appeals as of right an order dismissing plaintiff's breach of contract, fraudulent misrepresentation, innocent misrepresentation, negligent misrepresentation, and breach of warranty claims in its lawsuit against defendant Oliver Hatcher Construction & Development, Inc. involving the construction of a five-story residential and retail condominium project in Birmingham, Michigan. Plaintiff challenges two earlier orders granting defendant's motions for summary disposition of plaintiff's counts I through V. We affirm in part, and reverse in part.

I.

This lawsuit arises out of a May 2001 construction agreement ("AIA contract") between developer 250 Martin Investments, L.L.C. ("250 Martin") and defendant, which served as general contractor for the project. According to defendant, when the project was nearing completion, 250 Martin stopped paying and defendant ultimately exercised its right to stop work pursuant to the AIA contract. Around the same time, 250 Martin's construction lender initiated foreclosure proceedings and ultimately took possession.

In March 2004, 250 Martin's architect, who was also unpaid, began a construction lien foreclosure action in Oakland Circuit Court. The architect joined defendant in the proceeding. In December 2004, plaintiff purchased the eight residential units in the building for $8,500,000, and was assigned any rights the lender and 250 Martin had under the AIA contract. Plaintiff joined the lien action and began negotiating a settlement. In September 2005, the parties entered into a settlement agreement with a broad release:

> 8. Regarding Shain's release of Oliver, it is agreed:
>
> > A. Subject to the provisions of Paragraphs 12 and 14, and in consideration for Oliver's full performance of its obligations hereunder, including the settlement of Oliver's claims and the Subcontractor Claims listed on Exhibit E-1, and the discharges of the Lien Claims, the dismissal of the Subcontractor Claims listed on Exhibit E-1 and the release of the lis pendens by Oliver and the Subcontractors, except Couturier, Shain, upon receipt of the documents releasing the claims of Oliver and its Subcontractors and any other documents required hereunder, on behalf of itself and its shareholders, directors, officers, agents, affiliates, successors and assigns, hereby releases and discharges Oliver, its shareholders, officers, directors, affiliates, successors and assigns, and its Subcontractors, except Robovitsky and Couturier, from any and all claims, demands, actions, causes of action, suits, debts, contracts, agreements, damages, costs, expenses, liabilities and controversies whatsoever, in law or equity, of any type or nature, known and unknown, liquidated or contingent, arising out of or relating to the Contract except for those express obligations on behalf of the released parties set forth herein.

However, the parties also agreed:

> 12. Nothing in this Settlement Agreement is intended to or shall release, settle, waive or discharge *any latent, unknown claim or cause of action*, brought against any person by or on behalf of current or future: a) owners of the Property; b) owners of the Residential Units; and/or c) condominium associations arising out of or relating to the construction of the Improvements. [Emphasis added.]

In May 2006, while relocating windows and removing cladding to install two new dormers on the 5th floor of the south elevation, plaintiff's contractor, Charles Whitelaw discovered severe water infiltration and damage to the substructure. Consequently, plaintiff initiated the instant lawsuit.

In Count I, plaintiff alleged that defendant breached its AIA contract on numerous grounds. In Count II, plaintiff alleged that defendant fraudulently misrepresented that it had substantially completed the project, that its subcontractors completed 100 percent of the project, that the project did not suffer from construction defects, and that it did not have any claims against subcontractors. In Counts III and IV, plaintiff alleged innocent misrepresentation and negligent misrepresentation. Finally, in Count V, plaintiff alleged "breach of warranty" because defendant warranted that the work would be free from defects not inherent in the quality required or permitted.

Defendant filed a third-party complaint against two subcontractors, Conquest Construction, Inc., and Robovitsky, Inc., seeking damages if it was found liable on plaintiff's complaint. Defendant moved to summarily dismiss Counts I and V pursuant to MCR 2.116(C)(7) and 2.116(C)(10), arguing that the settlement agreement released it from plaintiff's claims. Defendant maintained that the claims did not fall within the exception to the release as "latent, unknown claim[s] or cause[s] of action." In particular, defendant argued that plaintiff knew about water leaks in the building before signing the settlement agreement, so plaintiff should have known about the construction defects causing the alleged water infiltration and damage to the substructure. Defendant filed a separate motion for summary disposition of Counts II, III, and IV, arguing that plaintiff failed to allege a breach of a duty separate and distinct from the contractual obligation. The trial court granted both motions, and entered an order dismissing plaintiff's complaint and defendant's third-party complaint. This appeal followed.

II. COUNT I (PARTS G THROUGH K) & COUNT V

On appeal, plaintiff challenges the trial court's order granting summary disposition of Counts I (parts G through K) and V. This Court reviews de novo a summary disposition ruling and interpretation of a contract. *Thorn v Mercy Mem Hosp Corp*, 281 Mich App 644, 647; 761 NW2d 414 (2008); *DaimlerChrysler Corp v G-Tech Prof Staffing, Inc*, 260 Mich App 183, 184-185; 678 NW2d 647 (2003).

> When reviewing a motion for summary disposition under MCR 2.116(C)(7), an appellate court accepts all the plaintiff's well-pleaded allegations as true, and construes them most favorably to the plaintiff, unless specifically contradicted by documentary evidence. The court must consider all affidavits, pleadings, depositions, admissions, and documentary evidence filed or submitted, and the motion should be granted only if no factual development could provide a basis for recovery.
>
> Similarly, when deciding a motion for summary disposition under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. If the evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Xu v Gay*, 257 Mich App 263, 266-267; 668 NW2d 166 (2003) (citations omitted).]

Central to this dispute is the plain and ordinary meaning of the phrase, "any latent, unknown claim or cause of action," in the exception to the release. See *Holmes v Holmes*, 281 Mich App 575, 593; 760 NW2d 300 (2008) (a contract must be interpreted according to its plain and ordinary meaning). Plaintiff argues that the trial court erred by questioning what plaintiff *should have known* when interpreting the term "unknown" in the exception to the release. We agree. "Unknown" is defined as "not known; not within the range of knowledge, experience or understanding; strange or unfamiliar" and "not discovered, explored, identified, or ascertained." *Random House Webster's College Dictionary*, p 1431 (2000). Our Supreme Court has defined "knowledge" as "'an awareness or understanding of a fact or circumstance; a state of mind in which a person has no substantial doubt about the existence of a fact."' *Echelon Homes, LLC v Carter Lumber Co*, 472 Mich 192, 197; 694 NW2d 544 (2005), quoting Black's Law Dictionary (8th ed). In contrast, "constructive knowledge" is '"knowledge that one using reasonable care or diligence should have, and therefore that is attributed by law to a given person."' *Id.*, quoting Black's Law Dictionary (8th ed). "Knowledge" by itself "does not encompass constructive knowledge, that one 'should have known."' *Id.*, quoting Black's Law Dictionary (8th ed).

By using the word "unknown" in the phrase "any latent, unknown claim or cause of action" in the exception to the release, the parties clearly only intended to preserve a latent claim or cause of action if it was not within the claimant's range of knowledge, experience or understanding. Had the parties also intended to preserve a latent claim or cause of action based on the claimant's constructive knowledge, the parties would have included additional language in the exception regarding the claimant's reasonable care or diligence. This Court will not rewrite clear and unambiguous language under the guise of interpretation. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 354; 596 NW2d 190 (1999).

Plaintiff also argues there is a question of fact regarding whether plaintiff had knowledge of any latent claims or causes of action when signing the settlement agreement. A close reading of the complaint, in Count I (parts G through K) and Count V, and the pleadings show that plaintiff asserts breach of contract and breach of warranty because defendant allegedly 1) failed to adequately supervise and direct the project, 2) failed to adequately inspect the work, 3) failed to provide work free from defects, and 4) failed to assume responsibility for work contrary to the law. The factual support for these claims includes evidence of inadequate, missing, and inconsistent flashing, weepholes, application of "dens glas," and vapor barrier, which resulted in water infiltration and damage to the substructure of the building.

The record demonstrates that, prior to the settlement agreement, plaintiff had knowledge of what was described as roof leaks and water leaking through the ceilings directly below most of the upper level doors. On one occasion, water was discovered on the interior of the fourth floor, approximately 10 to 12 feet from the exterior wall. These problems were attributed to either improperly installed or absent flashing and cladding at doors, a problem with roof coping in one location, absent weepholes in a brick beam, and a need for scuppers.

This Court has also defined "claim" as, '"[A] demand for something as due; as assertion of a right or an alleged right . . . an assertion of something as a fact . . . a right to claim or demand . . . ."' *Pinckney Community Sch v Continental Casualty Co*, 213 Mich App 521, 529; 540 NW2d 748 (1995), quoting *Random House Webster's College Dictionary*, p 249. "Cause of action" is defined as '"a factual situation that entitles one person to obtain a remedy in court

from another person."' *Tull v WTF, Inc*, 268 Mich App 24, 33; 706 NW2d 439 (2005), quoting Black's Law Dictionary (8th ed).

Leaking through upper level doors and the puddle on the fourth floor were not latent or invisible, see *Gregory v Cincinnati Inc*, 450 Mich 1, 20 n 22; 538 NW2d 325 (1995), quoting *Random House Webster's College Dictionary*, p 1086 ("The term latent is defined as 'present but not visible, apparent, or actualized; existing as potential . . . ."'), and plaintiff knew about these problems. A structural engineer had even advised plaintiff that they were typical and not alarming. Further, plaintiff could have instituted a claim or cause of action based on these problems, or in other words, these problems created a factual situation entitling plaintiff to seek a remedy under breach of contract or breach of warranty. Such a claim or cause of action therefore would not have fallen within the confines of the "any latent, unknown claim or cause of action" in the exception to the release. Despite plaintiff's knowledge of a claim or cause of action for breach of contract or breach of warranty based on the leaking through upper level doors and the puddle on the fourth floor, as we discussed earlier in this opinion, the plain language of the exception to the release did not impose a duty to use reasonable care or diligence to obtain additional knowledge of separate claims or causes of action that might exist in the building.

Further, we conclude that a question of fact exists regarding whether plaintiff had *actual knowledge* of separate claims or causes of action for breach of contract or breach of warranty based on water infiltration and damage to the substructure of building. There was evidence that this problem was latent. Whitelaw explained that the damage discovered in the substructure in May 2006 was unanticipated—if plaintiff had not been adding and relocating windows at that time, Whitelaw explained, "unless you had x-ray eyes, there was no way to determine [it was there]." The record demonstrates that the vast majority of the existing exterior wall construction had to be removed to assess and repair the substructure damage. Experts who thereafter inspected the building attributed the damage to more than just the defects plaintiff knew about before the settlement agreement and release, including inadequate, missing, and inconsistent application of "dens glas," and vapor barrier. These defects and the resulting water infiltration and damage to the substructure of building created a new factual situation entitling plaintiff to seek a remedy under breach of contract or breach of warranty. Because a question of fact exists regarding whether plaintiff had knowledge of such claims or causes of action and whether those claims or causes of action fell within the confines of the exception to the release, the trial court erred when it granted defendant's motion for summary disposition with respect to Counts I (parts G through K) and Count V.

III. COUNT I (PARTS A THROUGH F)

In Count I, part A, plaintiff alleged that defendant breached the AIA contract by failing to achieve substantial completion by the April 16, 2002 contract date. However, at the time of the September 2005 settlement agreement, plaintiff knew that defendant did not submit the Certificate of Substantial Completion until October 2003. Absent evidence that a claim for failing to achieve substantial completion within the contractual timeline was latent or unknown to plaintiff at the time of the settlement agreement, the trial court properly concluded that this claim was released and did not fall within the exception to release.

Likewise, in Count I, part B, plaintiff alleged that defendant breached the AIA contract by demanding payment that would only leave 1.8 percent of retainage. However, by the time of the September 2005 settlement agreement, plaintiff knew that the AIA contract provided for a 10 percent retainage and plaintiff also knew that defendant submitted the invoice (leaving only 1.8 percent) to 250 Martin on September 12, 2003. There are no other facts in the record to demonstrate that a claim arising from the September 12, 2003 invoice was latent or unknown to plaintiff, therefore the trial court properly concluded that this claim was released and did not fall under the exception to release.

In Count I, part C, plaintiff alleged that defendant breached the AIA contract by demanding payment on September 16, 2003 for the unsigned Change Order #15 even though the form expressly stated that the order was not valid unless signed by the owner and contractor. There is no evidence that this unsigned change order was hidden or unknown to plaintiff at the time of the settlement agreement, so the trial court properly concluded that this claim was released and did not fall under the exception to release.

Plaintiff also alleged that defendant breached the AIA contract by representing that it was 100% complete as of August 2003 (part D), by representing that it had substantially performed its duties in the Certificate of Substantial Completion (part E), and by demanding final payment in January 2004 before final payment was due under the AIA contract (part F). Again, all of these events occurred prior to the settlement agreement, and because there is no evidence that these documents and demand were latent or unknown to plaintiff at the time of the settlement agreement, the trial court properly concluded that these claims were released and did not fall under the exception to release.

IV. COUNTS II, III, AND IV

Counts II, III, and IV involve claims for fraudulent misrepresentation (causing plaintiff to continue performance of the AIA contract), innocent misrepresentation, and negligent misrepresentation. Plaintiff must allege a duty "separate and distinct" from that imposed by the AIA contract to give rise to tort liability pursuant to *Rinaldo's Constr Corp v Michigan Bell Tel Co*, 454 Mich 65, 84; 559 NW2d 647 (1997). In *Rinaldo's Constr*, the plaintiff alleged that the defendant telephone company was negligent in failing to transfer the plaintiff's telephone service to its new address, resulting in the loss of business revenue. In determining whether the plaintiff could maintain an action in tort, the Court stated that "the threshold inquiry is whether the plaintiff alleges violation of a legal duty separate and distinct from the contractual obligation." *Id*. at 84. Relying on *Hart v Ludwig*, 347 Mich 559, 565; 79 NW2d 895 (1956), the Court elaborated that '"if a relation exists which would give rise to a legal duty without enforcing the contract promise itself, the tort action will lie, otherwise not."' *Id*. Because the plaintiff failed to allege the "violation of an independent legal duty distinct from the duties arising out of the contractual relationship[,]" the Court in *Rinaldo's Constr* held that there existed no cognizable action in tort, "'regardless of the variety of names [plaintiff gives the] claim[.]'" *Id.* at 85, quoting *Valentine v Michigan Bell Tel Co*, 388 Mich 19, 22; 199 NW2d 182 (1972) (second set of brackets in original), abrogated on other grounds by *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185 (2001).

The record demonstrates that defendant promised to serve as a general contractor for 250 Martin in the AIA Contract, which was subsequently assigned by 250 Martin to plaintiff. Its duties in the contract included supervision of the work using its best skill and attention, inspection of work, preparation of a Certificate of Substantial Completion when the work was substantially complete, and warranting that the work would be free from defects. Plaintiff alleges the following misrepresentations, which were all tied to defendant's contractual duties: 1) representation that the project was substantially complete, 2) representation that the project did not contain defects, and 3) representation that defendant had no claims against subcontractors for improper, poor, or incomplete work. Therefore, the trial court did not err by granting defendant's motion for summary disposition of Counts II, III, and IV absent any allegation of a "violation of an independent legal duty distinct from the duties arising out of the" AIA contract. *Rinaldo's Constr*, 454 Mich at 85.[1]

V. AMENDMENT TO THE COMPLAINT

Plaintiff argues that the trial court abused its discretion by failing to allow plaintiff to amend the complaint to add a claim for the rescission of the settlement agreement (particularly the release) because plaintiff maintains that the agreement was the result of fraud or silence where defendant had a duty to disclose defects. "If a court grants summary disposition pursuant to MCR 2.116(C)(8), (9), or (10), the court must give the parties an opportunity to amend their pleadings pursuant to MCR 2.118, unless the amendment would be futile." *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997), citing MCR 2.116(I)(5).

An amendment to add a claim for the rescission of the release would have been futile here because "a plaintiff must tender any consideration received in exchange for a release before or simultaneously with the filing of a suit that contravenes that release." *Rinke v Auto Moulding Co*, 226 Mich App 432, 436; 573 NW2d 344 (1997), citing *Stefanac v Cranbrook Ed Community* (*After Remand*), 435 Mich 155, 176; 458 NW2d 56 (1990). There is no evidence that plaintiff tendered any such consideration before or simultaneously with moving to amend the complaint. There are two exceptions to this rule: (1) the defendant waives the plaintiff's duty to tender back, or (2) there is fraud in the execution (meaning fraud is in inducing the plaintiff to sign a release under the belief that the plaintiff was signing something else). *Stefanac*, 435 Mich at 165-166. However, there is no evidence in the record that defendant has waived plaintiff's duty to tender

---

[1] We note that plaintiff's reliance on *Farm Bureau Mut v Combustion Research Corp*, 255 Mich App 715, 723; 662 NW2d 439 (2003), to argue that a distinct duty to warn or disclose arose from post-contractual activities, is misplaced. Unlike the defendant in *Farm Bureau* that did not have a contractual relationship with the purchaser to perform repairs or maintenance, defendant had a contractual relationship with plaintiff to warrant the work and disclose remaining work under the project (i.e. punch list). We also note that plaintiff's reliance on authority involving fraud in the inducement, see *Nowicki v Podgorski*, 359 Mich 18; 101 NW2d 371 (1960) and *Groening v Opsata*, 323 Mich 73; 34 NW2d 560 (1948), is unpersuasive here because plaintiff alleges fraud in the performance of the AIA Contract.

back, and plaintiff does not allege that it signed the release believing that it was signing something else. Therefore, the trial court did not abuse its discretion by denying plaintiff's motion to amend.

We affirm the portion of trial court's order granting summary disposition of Count I (parts A through F) and the trial court's order granting summary disposition of Counts II, III, and IV. We reverse the portion of the trial court's order granting summary disposition of Counts I (parts G through K) and Counts V.

No costs to either party. MCR 7.219(A).

/s/ William C. Whitbeck
/s/ Peter D. O'Connell
/s/ Kurtis T. Wilder